

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

Docket Number

75-7356

Bp/s

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X

In the Matter of the Arbitration
between

ROBERT P. HERZOG

Petitioner-Appellee

v.

FRANK ROBINSON

Respondent-Appellant

-----X



APPEAL
FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Preliminary Statement

Robinson's (appellant's) brief, previously submitted, demonstrates that this Court should reverse the Judgment of the District Court and direct that the arbitration Award be vacated, as required by the applicable Statute (whether 9 USC 10 or NY CPLR 7511), because:

A. The arbitrators shirked their responsibility to decide the entire dispute submitted for determination and instead unfairly limited the scope of the proceedings. Robinson was prejudiced by the arbitrators' misconduct and misbehavior:

- (1) in refusing to postpone the hearing to permit the joinder of additional parties;
- (2) in refusing to hear, and by foreclosing, evidence pertinent and material to the controversy;
- (3) in refusing to postpone the hearing to permit Robinson's newly engaged counsel to prepare adequately for the hearing; and

(4) by failing to order the taking of the depositions which Robinson requested prior to the hearing.

B. The arbitrators imperfectly executed their powers upon the subject matter submitted by failing to make an Award that was

- (1) ~~merit~~,
- (2) ~~de~~ ~~late~~, and
- (3) final.

C. The arbitrators exceeded their powers by awarding, contrary to public policy, a forfeiture and penalty of \$50,000.

In the main, Herzog's (appellee's) answering brief avoids the merits of the substantial issues which Robinson raises and does not join issue with Robinson. Instead Herzog argues generally (Herzog's brief, page 6) that the District Court reviewed Robinson's points and found them to be without merit. Herzog's reliance on the District Court's determination is unfounded. His blanket argument falls because the District Court itself misread the record, came to erroneous legal conclusions, failed to consider many of Robinson's points, and ~~erred~~ in not vacating the Award upon the statutory grounds.

We discuss below each of Herzog's specific points
seriatim:

POINT I

Herzog asserts that Robinson is attempting to relitigate and reargue every issue of fact and law decided by the arbitrators and reviewed by the District Court below. Herzog is in error. Robinson is not attempting to relitigate or reargue the arbitration. Rather Robinson believes that the judgment should be set aside, and the arbitration Award vacated, on the statutory grounds set forth above, which are discussed more fully in Robinson's opening brief in this Court.

POINT II

Robinson's brief (pages 24-28) submits that the arbitrators should have joined as parties to the proceeding the "accepting" creditors and Mari-Jo Robinson, all of whom were parties to the Offer under which the arbitration arose. Herzog argues (brief, page 8) that joinder of these parties was unnecessary. Herzog bases his conclusion on the District Court's statement (164) that: "Since Herzog acted as the authorized representative of the creditors in the arbitration, they were bound by the arbitrators' decision."

As Robinson's brief (page 24) demonstrates, the quoted District Court statement is unsupported by the record and is in error in its factual premise; and that accordingly its legal conclusion falls.

Herzog does not attempt to support the District Court's factual premise. The Court's attention is invited to the fact that Herzog merely repeats the District Court's statement; Herzog does not indicate either the source, or the scope, of his purported authority.

Whatever authority Herzog had could only be derived from the Offer (4) or the "Acceptance" form (12) assuming arguendo that the precondition for the acceptance of the Offer was satisfied. But neither the Offer nor the "Acceptance" form (nor Herzog's Summary (9) of the Offer) gives Herzog any authority to act at the arbitration to the exclusion of the "accepting" creditors. There is no support in the arbitration record for Herzog's statement (brief, page 10) that "once they accepted the Offer by filing the written acceptances with their representative, Herzog, the Award of the arbitrators concerning any dispute under the Offer was binding on them". Obviously the creditors were entitled to Notice of any dispute under the Offer and an opportunity to participate in any arbitration before their rights could be affected in any way.

All of the evidence in the Record contradicts Herzog's recent embrace of the District Court statement that he was the authorized representative of the creditors in the arbitration. Herzog, although an attorney by profession, did not claim to represent the "accepting" creditors either in the proceedings before the arbitrators or in those before the District Court. Herzog made it clear to the arbitrators that he was acting solely for himself in his position as escrowee stakeholder (13, 14, 40) under the Offer. In this connection it is noted that Herzog identifies himself in the several briefs and documents (which he submitted to the arbitrators, to the District Court and to this Court) either as claimant or appearing pro se, and not as representative of the "accepting" creditors. The arbitrators well understood that Herzog was acting only for himself and not for the "accepting" creditors; (cf 80, Tr 269, 270 annexed). The arbitrators' reservation of decision on Robinson's motion to dismiss for lack of joinder of parties would have been meaningless had the arbitrators believed that Herzog (or the arbitrators) could bind the "accepting" creditors. Moreover the Award does not purport to be binding on any creditor and does not mention any other party to the Offer other than Herzog and Robinson.

Herzog begs the question when he states (brief, pages 9, 10) "that no prejudice would accrue because of the non-joinder, since the rights of all the parties to the Offer had to be determined initially by arbitration under the Offer, and no suit could be brought by any party, including a creditor, until arbitration had decided the rights of the parties under the Offer". Obviously, no determination binding on the creditor parties could be made until the "accepting" creditors were joined.

In general Herzog avoids discussion of that portion of Robinson's brief (pages 26-28) which sets forth several substantial questions submitted for determination which were shirked by the arbitrators. Rather Herzog sows confusion by misstating Robinson's position.

For example, Herzog, (and the District Court) misunderstands the area of focus of Robinson's concern as to multiple litigation when he states that payment to an authorized representative of a creditor discharges the debtor's responsibility pro tanto. Robinson's concern (brief page 28) as to multiple litigation arises (1) from the fact that all parties to the Offer were not before the arbitrators and therefore were not bound by the Award; (2) the arbitrators failed to determine several issues submitted; and (3) from the fact that the Award did not indicate whether, or not, the \$50,000 Award was by way of forfeiture thereby permitting the creditors to claim subsequently that the payment thereof did not effect a discharge in any amount.

Similarly, Herzog misstates the area of Robinson's concern in his treatment of the Seldner and Petrol Corporation cases. Robinson does not claim that he was not given notice of the hearing. Obviously he was. Rather Robinson submits that these cases hold that the "accepting" creditors were

entitled to notice and an opportunity to participate in the arbitration proceedings and that, in the absence thereof, an arbitration Award could be set aside by such creditor both as violative of due process and as a substantial breach of the AAA Commercial rules. Obviously Robinson is prejudiced thereby because he bargained in the Offer for a binding arbitration proceeding (1) in which all the parties to the Offer were joined, and (2) which would comply with the established Commercial Arbitration rules including the provisions for Notice and Hearing of all parties.

POINT III

Robinson and Herzog apparently agree (Herzog's brief, page 13) that an arbitration award should be set aside where the arbitrators' misconduct consists merely of the foreclosure of substantial evidence. Robinson's brief (pages 29-35) demonstrates that the rulings of the arbitrators foreclosed substantial evidence not only in the failure to grant an adjournment or to grant the requested depositions (which Herzog discusses) but also on the crucial question of "acceptance" and whether there was a "meeting of the minds" (which Herzog does not discuss).

In connection with Herzog's quotation (brief, page 14) from the "Summary and Conclusion" (pages 37-40) of Robinson's

Opening Brief to the arbitrators, it is observed that Herzog has taken such quotation out of context (and indeed has left out a relevant six word phrase from the middle of said quotation and the conclusion thereof which expressed concern as to the failure to join parties). The essential thrust of the "Summary and Conclusion" was that if the arbitrators found that the Offer had been accepted by the requisite number of creditors, then the arbitrators should adjourn the proceedings to permit joinder so that all issues arising out of the "Offer" submitted to the arbitrators could be tried by all parties and resolved in a single proceeding.

POINT IV

Robinson's brief (page 34) demonstrates that the Award is not mutual in that it does not, and cannot, bind the "accepting" creditors (who with Mari-Jo Robinson are parties to the Offer), none of whom was joined in the proceeding. Herzog's brief has failed to address this aspect of the question of mutuality.

Robinson's brief (pages 18-21, 35-37) demonstrates that the Award is not definite in the following respects:

- a) it does not set forth the identity or class of creditors entitled to participate in the Award;

- b) it does not require Herzog to pay the entire \$50,000, or any part thereof, to any creditor;
- c) it does not indicate whether the payment of \$50,000, or any part thereof, is to be credited against the original debt owed to a creditor under the Moratorium Agreement, or whether it is to be credited against the reduced amount owed under the "accepted" Offer, or whether it is to be treated in some other way. Moreover, it does not indicate whether Robinson is personally obligated to the creditors for the deposit of the notes and/or cash required by the Offer.
- d) it does not indicate whether the payment of the \$50,000 is by way of liquidated damages; or whether it is a penalty or forfeiture.

Herzog has failed to address these aspects of the question of definiteness.

With respect to subparagraphs (c) and (d) above, the Court's attention is invited to the fact that Herzog has

switched positions and adopted in this Court (brief, page 4) the District Court's language (162, 163) to the effect that the Offer, if accepted, would be substituted in place of the Moratorium Agreement. At the arbitration Herzog took the contrary position (94, 98) and maintained that the Moratorium Agreement survived, or was reinstated, in the event Robinson failed to deposit the cash and/or notes referred to in the Offer. Herzog's attempt to stipulate at the arbitration (100) that he would not proceed personally against Robinson (a stipulation which Robinson rejected as unacceptable because it did not bind the creditors) merely points up the fact that in the absence of joinder of the "accepting" creditors, any Award would lack definiteness as well as mutuality and finality.

Robinson's brief (page 38) demonstrates that the Award is not final in that it does not put an end to, but rather encourages, litigation by its avoidance of, and failure to decide, the issues presented, and by its ambiguities.

Herzog (brief, page 16) confines his discussion of mutuality, definiteness and finality by arguing for a narrow construction of the issues presented and cites in support an arbitrator's comment appearing on page 91 of the Appendix in support. But even a reading of that page in its entirety shows that the issues submitted by Robinson were broader.

If the arbitrators had any function it was to decide all issues presented to them. The arbitrators were not empowered to select specific issues to decide while shirking others. By failing to decide the issues which Robinson advanced the arbitrators not only insured that the Award lacked finality, but failed to fulfill their function and were chargeable with misconduct and misbehavior to Robinson's prejudice.

POINT V

Robinson's brief (pages 38-44) demonstrates that the arbitrators exceeded their powers in awarding a forfeiture, or penalty contrary to public policy. Robinson's brief asserts (which Herzog does not deny) that there was no evidence of any kind in the Record of the arbitration that there was any discussion or negotiation between the parties as to the impracticability or difficulty involved in fixing damages, or that the \$50,000 forfeiture provision was an attempt by the parties to reach a reasonable pre-estimate of damages. Indeed, the Record indicates that the deposit of the \$50,000 was intended solely and only, to demonstrate Robinson's bona fides (6, Tr 155). Furthermore there was no evidence of any kind offered at the arbitration with respect to the damages actually suffered by the creditors.

Herzog does not meet this issue. Rather at this late date he weakly attempts to justify the \$50,000 deposit as

liquidated damages without any support in the Record and despite the fact that the Offer uses the term "forfeiture" (7). In this connection Herzog, in at least seven places in his brief, characterizes the \$50,000 as the creditors' "immediate damages" or "immediate liquidated damages". Herzog's recent coining of the phrase "immediate liquidated damages" — at best a contradiction in concepts — which is unsupported by either the Record or Award, is an obvious attempt to straddle the issue.

Herzog's attempt to distinguish the authority cited by Robinson is ineffective. The cases stand as authority for the proposition that the public policy abhorring penalties and forfeitures overrides any policy in favor of confirming arbitration awards.

POINT VI

Herzog argues that Robinson's appeal is frivolous and without merit and interposed for the purpose of delay. Robinson denies these assertions. Robinson is not responsible for any delay.

Herzog, not Robinson, is chargeable with any delay resulting from the reversal of the District Court's determination and the vacation of the Award. It was Herzog who initiated the proceeding and failed to join the other parties, even after his attention had been directed to the effect of the lack of such joinder.

Robinson, even before the start of the evidentiary hearings, attempted to have the arbitrators cure the defects in the proceedings to date. Robinson pointed out at that time that the proceeding was incomplete and defective (141, Tr 40, 41). By brief submitted at the start of the evidentiary hearings, Robinson argued for joinder of the parties so that all issues could be determined. Robinson indicated in argument at that time that, in the absence of such joinder, the arbitrators were shadow-boxing (Tr 57). Robinson from the start of the hearings has argued against the obvious penalty and forfeiture.

It is Robinson who has been prejudiced throughout this proceeding by having to submit to an arbitration other than that contemplated in the Offer. If the arbitration clause in the Offer has any meaning, it contemplates a proceeding in which all the parties to the Offer are parties to the arbitration.

CONCLUSION

This Court should reverse the determination of the District Court and vacate the Award.

Dated: October 14, 1975.

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time.

MR. ROTHMAN: May I just briefly make a statement, that had I heard that or gotten the answer that it was to be returned, I would not have asked the question again.

MR. BUCKSTEIN: Okay, let's proceed.

MR. ROTHMAN: It was probably tucked in the middle of a speech and I lost it.

MR. BUCKSTEIN: Let's proceed.

BY MR. ROTHMAN:

Q What, to your mind, Mr. Herzog, then is the meaning of the words in the offer document, under the paragraph, "Deposit and Offer"?

A Are you referring to what document?

Q The "Offer" document.

A I believe that the offer speaks for itself. I don't know that it has any ambiguity, to my mind.

Q I haven't even asked you the question.

MR. GREENBURG: Let me also indicate that since you are in a dual capacity, Mr. Herzog, if you want to object to a question, indicate your objection again rather than arguing with the question.

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1 THE WITNESS: Yes, sir.

2 MR. GREENBURG: And then we can rule
3 on the question.

4 MR. VOGEL: May I understand the dual
5 capacity he is in, in the arbitrators' minds?

6 MR. GREENBURG: Well, I take it he
7 is both a witness and counsel.

8 THE WITNESS: For himself.

9 MR. GREENBURG: For himself.

10 So he has the right to object to a
11 question and after a ruling, if he is
12 required, he will answer the question as a
13 witness.

14 MR. VOGEL: Thank you.

15 MR. GREENBURG: Why don't you put a
16 question, Mr. Rothman.

17 BY MR. ROTHMAN:

18 Q I am specifically referring, Mr.
19 Herzog, to the sentence in the paragraph entitled,
20 "Deposit and Offer," which begins, "In the event
21 80 percent of the creditors," and I am continuing,
22 "as set forth above, accept the offer as made
23 herein, the said promissory note will become due
24 and payable in accordance with its terms."
25

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